

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

8 BRENDAN NASBY,)
9 Petitioner,) 3:07-cv-0304-ECR-RAM
10 vs.)
11 E.K. McDANIEL, *et al.*,)
12 Respondents.)
/
ORDER

15 Petitioner is a state prisoner proceeding with counsel on a petition for writ of habeas
16 corpus pursuant to 28 U.S.C. § 2254.

17 Subsequent to a decision on respondents' motion to dismiss the petition as mixed and
18 as containing procedurally barred claims, petitioner elected to move for a stay of the proceedings
19 under *Rhines v. Weber*, 544 U.S. 269 (2005).

20 In *Rhines*, the Supreme Court held that the Court’s discretion to hold a petition in
21 abeyance to allow for exhaustion of claims in state court is circumscribed by the Antiterrorism and
22 Effective Death Penalty Act of 1996 (AEDPA). *In light of AEDPA’s objectives, “stay and abeyance*
23 *[is] available only in limited circumstances” and “is only appropriate when the district court*
24 *determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.”*

25 *Id.* at 277. Even if petitioner were to demonstrate good cause for that failure, “the district court

26 would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly

27 meritless.” *Id.*

1 In this case, the Court does not find good cause to excuse petitioner's failure.
 2 Petitioner has made no attempt to show that he had good cause for his failure. Despite being
 3 specifically advised of the *Rhines* requirements to obtain a stay, petitioner merely states that a stay is
 4 requested without offering any excuse or making any attempt to show good cause. Accordingly,
 5 Petitioner's motion for stay of the proceedings shall be denied and the petition shall be dismissed.

6 **Certificate of Appealability**

7 In order to proceed with his appeal, petitioner must receive a certificate of
 8 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
 9 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
 10 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional
 11 right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
 12 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the
 13 district court's assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529
 14 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
 15 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
 16 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

17 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
 18 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
 19 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
 20 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
 21 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
 22 issuance of a certificate of appealability, and determines that none meet that standard. The Court
 23 will therefore deny petitioner a certificate of appealability.

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1 **IT IS THEREFORE ORDERED** that the Motion for Stay and Abeyance (docket
2 #41) is **DENIED**. The petition is **DISMISSED WITH PREJUDICE**. No certificate of
3 appealability shall issue. The Clerk shall enter judgement accordingly.

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5 Dated this 17th day of November, 2010.

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UNITED STATES DISTRICT JUDGE

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